

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JOSHUA J. TRUEBLOOD,

Plaintiff,

v.

OFFICER SGT. CAPPOLA et al.,

Defendant.

CASE NO. 3:19-cv-05816-RBL-JRC

ORDER ON PLAINTIFF'S THIRD
MOTION TO APPOINT COUNSEL

This matter is before the Court on plaintiff's third motion to appoint counsel. *See* Dkt. 46.

On December 13, 2019, this Court denied plaintiff's first motion to appoint counsel (Dkt. 14) because plaintiff had not demonstrated exceptional circumstances. Dkt. 27. On January 24, 2020, the Court denied plaintiff's second motion to appoint counsel (Dkt. 28) because plaintiff did not set forth any additional evidence or reasons supporting his motion. *See* Dkt. 35. On March 2, 2020, plaintiff filed his third motion to appoint counsel. *See* Dkt. 46. Having reviewed the motion and the balance of the record, the Court finds that the motion should be denied

1 without prejudice because plaintiff has demonstrated his ability to articulate his claims without
 2 an attorney and there are no exceptional circumstances compelling the Court to appoint counsel
 3 at this time.

4 **DISCUSSION**

5 In seeking appointment of counsel, plaintiff states the following reasons:

- 6 (1) Plaintiff cannot obtain, receive, or store any video footage that he needs to litigate this
 7 case;
- 8 (2) Plaintiff is unable to contact or locate witnesses;
- 9 (3) The case will require expert witness testimony of a medical professional;
- 10 (4) Plaintiff is unable to obtain documents needed from defendant;
- 11 (5) Plaintiff lacks legal experience and knowledge of complex discovery rules; and
- 12 (6) Potential credibility issues in the case support appointment of counsel.

13 *See* Dkt. 46, 1–2.

14 Defendants oppose plaintiff’s motion for appointment of counsel stating that (1) plaintiff
 15 is capable of articulating his claims *pro se*; (2) plaintiff has not demonstrated that his allegations
 16 involve complex issues; and (3) plaintiff has failed to demonstrate a likelihood of success on the
 17 merits. *See* Dkt. 52, at 2.

18 There is no right to have counsel appointed in cases brought under 42 U.S.C. § 1983.
 19 Although the Court, under 28 U.S.C. § 1915(e)(1), can request counsel to represent a party
 20 proceeding *in forma pauperis*, the Court may do so only in exceptional circumstances. *Wilborn*
 21 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Franklin v. Murphy*, 745 F.2d 1221, 1236
 22 (9th Cir. 1984); *Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980). A finding of exceptional
 23 circumstances requires an evaluation of both the likelihood of success on the merits and the
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1 ability of plaintiff to articulate claims *pro se* in light of the complexity of the legal issues
2 involved. *Wilborn*, 789 F.2d at 1331. The need for discovery does not necessarily qualify the
3 issues involved in a case as “complex.” *Id.*

4 Here, plaintiff has not raised novel or particularly complex issues—rather, his complaint
5 raises fairly straightforward issues involving whether corrections officers were deliberately
6 indifferent to his safety in violation of the Eighth Amendment. *See* Dkt. 9. Further, based on
7 plaintiff’s instant motion (Dkt. 46) and his amended complaint (Dkt. 9), and further evidenced by
8 plaintiff’s motions filed in this case (*see, e.g.*, Dkts. 36–38, 47–49), the Court finds that plaintiff
9 has clearly articulated the basis for his constitutional allegations. Plaintiff’s “lack of legal
10 experience and [lack of] knowledge of complex discovery rules” (Dkt. 46, at 2) do not amount to
11 the exceptional circumstances necessary to appoint counsel. *Wood v. Housewright*, 900 F.2d
12 1332, 1335–36 (9th Cir. 1990). Further, plaintiff asserts “credibility issue[s] might arise” in this
13 case that support appointment of counsel. Dkt. 46, at 2. Credibility is frequently at issue in
14 litigation, is not novel or unique to this case, and does not rise to the level of “exceptional
15 circumstances” that warrant the appointment of counsel. *See Rand*, 113 F.3d at 1525.

16 Moreover, while plaintiff’s claims may have merit, there are no pending dispositive
17 motions in this case, and the discovery period and dispositive motions deadline have not yet
18 passed. *See* Dkt. 34. Thus, it is still too early in this case for the Court to make a determination
19 as to plaintiff’s likelihood of success on the merits. Because of this, plaintiff has not yet
20 demonstrated the exceptional circumstances necessary for the Court to order appointment of
21 counsel.

22 Regarding discovery issues in this case, plaintiff asserts that he is unable to properly
23 conduct discovery without the appointment of counsel. *See* Dkt. 46, 1–2. Plaintiff asserts that he
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1 is unable to “obtain, receive, or store any video footage . . . [that] plaintiff needs to litigate his
2 case.” Dkt. 46, at 1. Plaintiff also asserts that he is “unable to contact or to locate case
3 witnesses.” *Id.* at 1–2. Plaintiff further asserts that he is unable “obtain documents needed from
4 defendants,” therefore, appointment of counsel would “help make discovery possible for []
5 plaintiff.” *Id.* at 2. However, plaintiff does not state what attempts, if any, he has made to
6 determine or locate potential witnesses, nor does plaintiff state what attempts he has made to
7 request documents from defendants. Additionally, plaintiff does not state whether there are no
8 other means for him to view any video footage other than to obtain a physical copy of any such
9 video footage.

10 The Court acknowledges plaintiff’s need for discovery, however, plaintiff is able to
11 identify potential witnesses and request documents by directly serving discovery requests on
12 defendants. *See, e.g.*, Fed. R. Civ. P. 33(a) (a party may serve on any other party no more than
13 25 written interrogatories); Fed. R. Civ. P. 34(a) (a may serve on any other party written requests
14 to produce and permit the requesting party to inspect or copy documents or electronically stored
15 information within the responding party’s possession, custody, or control). Further, plaintiff has
16 not identified how the potential discovery at issue is so complex that it requires the appointment
17 of counsel at this time. *See Wilborn*, 789 F.2d at 1331 n. 5 (“the need for further factual
18 discovery is not, by itself, sufficient to establish the complexity of the legal issues”).

19 Plaintiff also asserts that his case will require medical expert testimony. *See* Dkt. 46, at
20 2. Plaintiff does not provide additional evidence supporting this reason for appointment of
21 counsel. Although medical expert testimony could well be appropriate at a later date, and
22 although plaintiff may be able to establish a likelihood of success on the merits at a later stage of
23 litigation, the Court finds that, at this stage, plaintiff has a sufficient grasp of the facts and law
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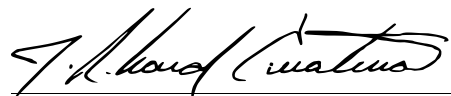
1 underlying his case such that he can adequately articulate his claims. Although it may be easier
2 for plaintiff to prosecute his case with the assistance of counsel, convenience alone is not enough
3 to warrant appointment of counsel.

4 Additionally, plaintiff may motion the Court pursuant to Rule 706(a) of the Federal Rules
5 of Evidence to appoint a neutral medical expert to aid in the Court's understanding of the
6 evidence. Plaintiff previously motioned the Court to appoint an expert witness. *See* Dkt. 10.
7 The Court denied plaintiff's prior motion *without prejudice*, meaning that plaintiff may renew
8 the motion again at a later stage in the litigation. *See* Dkt. 15. Accordingly, plaintiff may renew
9 his motion for the Court to appoint of an expert witness upon a showing of the complexity of
10 medical evidence in this case. *See McKinney v. Anderson*, 924 F.2d 1500, 1511 (9th Cir.), *cert.*
11 *granted, judgment vacated sub nom. Helling v. McKinney*, 502 U.S. 903, 112 S. Ct. 291, 116 L.
12 Ed. 2d 236 (1991), and *judgment reinstated*, 959 F.2d 853 (9th Cir. 1992). However, plaintiff
13 should not file a new motion to appoint an expert witness by merely repeating the reasons that
14 have already been denied.

15 CONCLUSION

16 For the reasons stated above, plaintiff's motion for appointment of counsel (Dkt. 46) is
17 hereby DENIED without prejudice. Plaintiff may renew his motion at a later date if he is able to
18 establish exceptional circumstances.

19 Dated this 21st day of April, 2020.

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23 J. Richard Creatura
24 United States Magistrate Judge